No. 16,216

IN THE

United States Court of Appeals
For the Ninth Circuit

LEE ANDREW WILLIAMS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	}

Appeal from the District Court for the District of Alaska, Second Division.

BRIEF FOR APPELLEE.

RUSSELL R. HERMANN,
United States Attorney,
Second Division, District of Alaska,
Nome, Alaska,
Attorney for Appellee.

FILE[D]
JAN 29 195[9]
PAUL P. O'BRIEN,

Subject Index

Page

Summary of argument .... Preface

Statement of the case 1

The argument 3

I. The court did not err when it consolidated the two cases for trial as they were two transactions which were inseparably connected together. The testimony in either case would have been admissible evidence as to motive, intent and knowledge necessary to establish guilt in the other case 3

(1) Evidence of rape was of probative value in the trial for obstructing justice 7

(2) Evidence of the charge of obstructing justice is also admissible as it shows probability of the rape having been committed 9

II. The allegations of the indictment of cause No. 1631 constituted a valid cause of action of obstructing justice 11

III. The expression by the district attorney that he thought the defendant was "lying" was made while commenting on the testimony of the defendant who took the stand and was not a remark which would prejudice the jury 17

IV. The testimony of Walter Sinn was admissible to establish the charge of obstructing justice and was admitted for that purpose and not to corroborate the testimony of the victim; the testimony of the victim was corroborated by three independent witnesses 19

Conclusion 22

Table of Authorities Cited

Cases

Cases	Pages
Beaux Arts Dresses v. United States, C.C.A. N.Y. 1925, 9 F. 2d 531, cert. denied 46 S. Ct. 210, 270 U.S. 644	4
Bosselman v. United States, N.Y. 1917, 239 F. 82, 84, 152 C.C.A. 132	15
Cataneo v. United States, C.C.A. Md. 1948, 167 F. 2d 820	4
Duke v. United States, C.C.A. Va. 1937, 90 F. 2d 840, 112 A.L.R. 317, cert. denied 58 S. Ct. 33, 302 U.S. 685	15
Johnston v. United States, 9th Cir. 1907, 154 F. 445	18
Ladrey v. United States, 155 F. 2d 417 (D.C. Cir. 1946)	8
McNeil v. United States, 66 App. D.C. 199, 85 F. 2d 698	4
Moore v. United States, 150 U.S. 57, 61 (1893)	7, 8
Odom v. United States, C.C.A. Tex. 1941, 116 F. 2d 996, reversed on other grounds 61 S. Ct. 957, 313 U.S. 544, 85 L. Ed. 1511	13, 16
Painter v. United States, 151 U.S. 396, 413 (1894)	7
Stockley v. United States, C.C.A. Cal. 1948, 166 F. 2d 704, cert. denied 68 S. Ct. 1502, 334 U.S. 850, 92 L. Ed. 1776	4
United States v. Antionelli Fireworks Co., C.C.A.N.Y. 1946, 155 F. 2d 631, cert. denied 67 S. Ct. 49	4
United States v. Bell, 14 Alaska Reports 142 (decided Dec. 19, 1952)	12
United States v. Bittinger, D.C. No. 1876, Fed. Case No. 14,598	13, 14
United States v. Freundlick, 95 F. 2d 376, 378-9 (2nd Cir. 1938)	10
United States v. Gottfried, 165 F. 2d 360, 363 (2nd Cir. 1948)	10
United States v. Hallinan (9th Cir.) 182 F. 2d 880	18
United States v. Katz, 78 F. Supp. 435, 438 (M.D. Pa. 1948)	10

Pages

United States v. McLeod, 119 F. 416 (erroneously cited as United States v. "M'Cloud") 14
United States v. Perlstein, et al., 120 F. 2d 276, C.C.A. N.J. 1941 5
United States v. Polakoff, C.C.A. N.Y. 1941, 121 F. 2d 333 cert. denied 62 S. Ct. 107, 314 U.S. 626, 86 L. Ed. 503 .. 14
United States v. Puff, 211 F. 2d 171, 175 (2nd Cir.), cert. denied 74 S. Ct. 713 (1954) 7, 8
United States v. Rosenberg, 195 F. 2d 583, 595 (2nd Cir. 1952) 7
United States v. Rosenblum, C.A. Ind. 1949, 176 F. 2d 321.. 4
United States v. Silverman, 3rd Cir., 106 F. 2d 750 5
United States v. Smith, 2nd Cir., 112 F. 2d 83 4

Walker v. United States, C.C.A. No. 1938, 93 F. 2d 792 13

Zamlock v. United States, 193 F. 2d 889, 892 (9th Cir.), cert. denied 343 U.S. 934 (1952) 8

Rules

Federal Rules of Criminal Procedure:
Rule 8(a) 3, 4
Rule 13 .... 3, 4

Statutes

Alaska Compiled Laws Annotated, 1949:
Section 65-7-29 (81 S.L.A. 1953) 11, 12

18 U.S.C., Section 1503 .... 12, 13, 15

SUMMARY OF ARGUMENT.

1. The court did not err in ordering causes Nos. 1631 (Obstructing Justice) and 1632 (Rape) consolidated for trial.

   (a) They were properly consolidated under Rule 13, Federal Rules of Criminal Procedure as they were two transactions closely connected together.

   (b) The charge of obstructing justice would have been admissible evidence to show guilty conduct on the part of the accused as to the rape charge.

   (c) The rape charge would have been admissible evidence to show motive for obstructing justice.

2. Cause No. 1631 stated a cause of action for obstructing justice as a case was pending in the District Court for presentation to the grand jury which defendant corruptly attempted to have dismissed.

3. The statement made by the District Attorney that he believed the defendant was lying was not prejudicial.

   (a) It was not inadmissible as an opinion as it was made in reference to the defendant's testimony on the witness stand.

   (b) The remark was not severe enough to be objectionable per se.

   (c) Two instructions were given by the court to the jury which eliminated any prejudicial effect.

4. The testimony of the witness Walter Sinn, a police officer, was admissible, not as corroboration of the victim, but to show that the victim was a witness and that defendant corruptly induced her to repudiate her statement.

No. 16,216

IN THE

United States Court of Appeals
For the Ninth Circuit

LEE ANDREW WILLIAMS, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	}

Appeal from the District Court for the District of Alaska, Second Division.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant in his brief at page two indicates that, Virginia Ahkinga, victim of the alleged rape "casually" mentioned to the police officer that she had intercourse with the defendant. It is conceded that the subject of rape came up during the investigation of another matter, but the discussion of rape was not a "casual" one. Although the statement which defendant was alleged to have had her falsely change later was first given at that time (Tr. Vol. 2 pp. 34 and 64), it was later put in writing at the same time the complaint was made (Tr. Vol. 2 pp. 64-65).

Appellant at page 3 of his brief alleges that appellant was not present when the alleged victim Virginia Ahkinga was interviewed at the schoolhouse by the Commissioner. Although defendant did not witness the interview itself he must have at least known she was interviewed as they saw each other at the schoolhouse on the date in question (Tr. Vol. 2 pp. 21, 22, 32, 40, 65, 111 and 112). Both defendant and Virginia were questioned at that time and defendant was advised that he was charged with statutory rape and thereupon waived preliminary examination and was held to answer to the grand jury.

This possible defense, that he did not know she was a witness, was never raised at the trial. At the time the witness gave her second statement repudiating the first statement, defendant had been advised by the commissioner that there had been a previous statement (Tr. pp. 113 and 114). Since the whole purpose of defendant's trip to Barrow was to get a statement from Virginia Ahkinga, he must have known she was a witness. It is this statement he is alleged to have procured falsely for the purpose of getting the charge dismissed and thus obstruct justice (Tr. Vol. 2 p. 126).

THE ARGUMENT.

I. THE COURT DID NOT ERR WHEN IT CONSOLIDATED THE TWO CASES FOR TRIAL AS THEY WERE TWO TRANSACTIONS WHICH WERE INSEPARABLY CONNECTED TOGETHER. THE TESTIMONY IN EITHER CASE WOULD HAVE BEEN ADMISSIBLE EVIDENCE AS TO MOTIVE, INTENT AND KNOWLEDGE NECESSARY TO ESTABLISH GUILT IN THE OTHER CASE.

Consolidation of two cases for trial together is governed by Rule 13 which also incorporates Rule 8(a) which reads as follows:

Federal Rules of Criminal Procedure, Rule 13

> The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Federal Rules of Criminal Procedure, Rule 8 (a)

> Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The courts in interpreting this rule have held generally that several charges may be consolidated where they were so connected in time, place, and occasion that it would be difficult to separate proofs of each. See *Beaux Arts Dresses v. United States,* C.C.A. N.Y.

1925, 9 F. 2d 531, *cert. denied* 46 S. Ct. 210, 270 U.S. 644.

Decisions have also held that the trial court has wide discretion in consolidating such indictments for trial. See *United States v. Rosenblum,* C.A. Ind. 1949, 176 F. 2d 321; and *United States v. Antionelli Fireworks Co.,* C.C.A. N.Y. 1946, 155 F. 2d 631, *cert. denied* 67 S. Ct. 49, where the court said at p. 635:

> The summary of the indictments and of the testimony already given amply demonstrates the near identity of the defendants, the similarity of the offenses charged, *and the necessarily overlapping nature of the evidence in support of each.* The facts of the case place it well within the terms of 18 U.S.C.A. Sec. 557 authorizing consolidation when "there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together". See *United States v. Smith,* 2 Cir., 112 F. 2d 83; *McNeil v. United States,* 66 App. D.C. 199, 85 F. 2d 698; Federal Rules of Criminal Procedure, Rules 8, 13, advisory committee notes thereto. (Italics mine.)

Since the trial courts are given discretion in determining whether two cases may be consolidated, the appellate courts will not reverse unless there is a clear abuse of discretion. See *Cataneo v. United States* C.C.A. Md. 1948, 167 F. 2d 820; *Stockley v. United States,* C.C.A. Cal., 1948, 166 F. 2d 704, *cert. denied* 68 S. Ct. 1502, 334 U.S. 850, 92 L. Ed. 1776. Several examples where cases involving similar or connected transactions as well as evidence of an overlapping

nature will be given below under a discussion as to the admissibility of one case as evidence of guilt in the other.

In *United States v. Perlstein, et al.* (120 F. 2d 276, C.C.A. N.J. 1941), the court held that it was not error to try together two counts in an indictment one of which was conspiracy to operate an unregistered still and the other conspiracy to obstruct justice by inducing witnesses not to identify the accused. Although in that case the two charges were of the same class as they were both conspiracies, the court did not allow the joinder for that reason alone, but said at page 280:

> However, even though the offenses charged are of the same class, the right to join them in one indictment is further restricted by the statute, which provides that the right exists only if they "may be properly joined". The propriety of such joinder must be determined under "the settled principles of criminal laws".

The court then determined the test to be used in determining whether separate charges met the usual objections to a joinder and said at page 281:

> It thus appears that action upon an alleged misjoinder of counts in an indictment is a matter of discretion with the court and that if in the opinion of the court the jury will not be confused by the multiplicity of charges and the defendant will not be embarrassed in his defense the court may refuse to direct an election by the government. It is, as this court pointed out in *United States v. Silverman,* 3 Cir., 106 F.2d 750, a choice

> between the economy of a single trial of issues which are closely related, on the one hand, and the safeguarding of the defendant from the possibility of prejudice arising from the multiple charges, on the other hand.

In the instant case the two charges in separate indictments were tried together as they involved the same transaction rather than cases of the same character. That they were parts of the same transaction is made quite clear in the court's instruction No. 4, where the jury was advised that in order to find the defendant guilty of obstructing justice they must first find him guilty of the charge of rape (Tr. Vol. 1, p. 10). Since the first of the alleged false statements was a denial of any rape and since the existence of the rape was a matter within the personal knowledge of the defendant, whether or not he "corruptly" influenced the witness must of necessity depend on whether or not there was in fact a rape. The fact of a rape being committed was the ultimate issue in the charge of rape and was a necessary element of the charge of obstructing justice as he was charged with knowledge that the victim's denial of rape was a false statement. The rape itself was therefore a common denominator to both charges and would have to be proved in both cases in order to justify a conviction as to either charge.

Appellant claims that the jury may have been misled or confused by the joinder. This could only be true if the proof of one charge could in fact be kept out of a trial for the other. It is appellee's conten-

tion that they could not but that (1) evidence of the rape would be admissible as proof of the charge of obstructing justice to show intent, motive, and as mentioned above, guilty knowledge, (2) the fact of a corrupt obstruction of justice would be admissible during a trial for the charge of rape as a statement in the nature of an admission and subsequent guilty conduct. These two propositions will be taken up in the order given.

(1) Evidence of Rape Was of Probative Value in the Trial for Obstructing Justice.

As a general proposition proof of a motive to commit a crime is always relevant. See *Painter v. United States,* 151 U.S. 396, at 413 (1894). In that case it was held that it was not necessary to show a motive, but it was indicated that it is always a weakness of the case if no motive is shown.

Trial courts are given broad discretion to admit evidence of motive. See *Moore v. United States,* 150 U.S. 57, 61 (1893), although how much and what kind of evidence should come into a trial is a matter for carefully exercised judicial discretion, *United States v. Rosenberg,* 195 F. 2d 583, 595 (2nd Cir. 1952).

In another recent case, a murder trial, it was held that evidence that the accused had robbed a bank was admissible to show a motive to shoot his way out of a hotel in which he was entrapped. See *United States v. Puff,* 211 F. 2d 171, 175 (2nd Cir.), *cert. denied;* 74 S. Ct. 713 (1954).

Another recent case involved a charge of obstructing justice, the proof of knowledge of the execution of a mortgage was admitted to show that defendant could hope for financial gain by obtaining a wealthy client for whom he attempted to obstruct justice. See *Zamlock v. United States,* 193 F. 2d 889, 892 (9 Cir.), *cert. denied* 343 U.S. 934 (1952).

Motive, like intent, may be shown by proof of prior criminal conduct of a defendant even where he does not take the stand. See *United States v. Puff, supra; United States v. Schiller,* 187 F. 2d 572, 574 (2 Cir. 1951). The prior criminal conduct utilized to show motive does not necessarily have to involve similar offenses. See *Moore v. United States, supra,* at p. 61. In that case the two crimes were similar, but the decision was based on the fact that one crime was to prevent discovery of the other crimes, as the victim of the murder on trial was killed while investigating a prior murder. The court said:

> "The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it were it otherwise competent."

A case similar to the one now on appeal is *Ladrey v. United States,* 155 F. 2d 417 (D.C. Cir., 1946). In that case the defendant was charged with attempt to bribe another not to testify as to an abortion he performed on her. The court admitted evidence as to the abortion previously performed on the witness defendant attempted to bribe.

> Sec. "(2)" . . . The appellants urge that it was improper and prejudicial for the court to permit Hazel Queenan to testify concerning the illegal operation she said Ladrey performed on her. They said that this was evidence of an offense for which they were not on trial. In the case before us, which is the bribery charge, it was proper to admit evidence of the attempt to bribe, and, as well, evidence tending to show that Hazel Queenan was a material witness in the abortion case. Her testimony concerning the operation was limited to statements to the effect that she was the person upon whom the operation had been performed, and statements showing the nature of the operation. This was no more than the bare necessity of the case for the prosecution required. Consequently it was not error to receive it.

From this holding it is quite apparent that as a matter of evidence proof of a prior or subsequent crime is admissible if it has probative value as to defendant's motive, intent, or knowledge regardless of whether the crimes are of a similar character. Here the government contends that the charge of obstructing justice is part of the same transaction as the rape and that the two crimes, as in the abortion case cited above, are so closely associated as not to be capable of being separated.

(2) Evidence of the Charge of Obstructing Justice Is Also Admissible as It Shows Probability of the Rape Having Been Committed.

The defendant Virginia Ahkinga stated that the statement induced by the defendant was a false statement and that he induced her to change her story so

he would not go to jail and so he could support her, and that he implied he would marry her (Tr. Vol. II pp. 20, 21, and 43). The defendant, if this were true, was thus attempting to suppress evidence of his guilt. It has been repeatedly held that efforts to suppress evidence are admissible as evidence of guilt. See *United States v. Gottfried,* 165 F. 2d 360, 363 (2d Cir. 1948) concerning the making of a false written statement to the O.P.A.:

> It is the universal rule that attempts to suppress evidence of a crime are competent evidence of guilt.

See, also *United States v. Freundlick,* 95 F. 2d 376 at 378-9 (2 Cir. 1938) where accused's attempt to influence the testimony of a witness was held admissible:

> If the proper interpretation of the interview was that Freundlick was trying to influence Peckman's testimony regardless of the truth, it is of course well settled that that was evidence of guilt.

See, also, *United States v. Katz,* 78 F. Supp. 435, 438 (M.D. Pa. 1948):

> Evidence of the misconduct of a party in connection with the trial of his case is admissible as tending to show that the party guilty of the misconduct is unwilling to rely on the truth of his cause.

SUMMARY. Above it has been shown that when deciding whether or not two crimes involving the same transaction may be tried at one trial the test is

whether or not the defendant would be prejudiced by such a joinder. It has been shown above that the defendant here would not be so prejudiced as evidence of either offense would have probative value and be admissible as evidence of guilt of the other offense. It is therefore submitted that the trial court did not abuse its discretion in ordering the cases consolidated for trial (Appellant's Spec. I and II).

II. THE ALLEGATIONS OF THE INDICTMENT OF CAUSE NO. 1631 CONSTITUTED A VALID CAUSE OF ACTION OF OBSTRUCTING JUSTICE.

Indictment No. 1631 (Tr. Vol. 1 p. 1) charges the defendant with corruptly influencing the witness Virginia Ahkinga to make a false statement for the purpose of having a charge, on which the defendant was held to answer, be dismissed. The territorial statute in question is Chapter 81, S.L.A. 1953, now Alaska Compiled Laws Annotated Cumulative Supplement 1957, Section 65-7-29 which reads as follows:

> Sec. 65-7-29. Influencing witnesses, judges or jurors: Obstructing administration of justice. Whoever corruptly, or by threats or force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any witness, in the District Court of the District of Alaska or before any United States Commissioner or other committing Magistrate, or any grand or petit juror, judge, or officer in or of the District Court of the District of Alaska, or officer who may be serving at any examination or other proceeding before any United States Commissioner

> or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall, upon conviction, be fined not more than $5,000 or imprisoned not more than five years, or both. (L 1953, Ch 81, Sec 1, p 193, app Mar. 26, 1953.)

A glance at Section 65-7-29 will reveal that it is almost identical with Title 18 U.S.C.A. Section 1503 (62 Stat. 769). The reason for this is probably the decision in *United States v. Bell,* 14 Alaska Reports 142 (Decided Dec. 19, 1952). In that case it was held that 18 U.S.C.A. Section 1503 did not apply in a case involving Alaskan statutes as the District Court of Alaska was not a "court of the United States" within the meaning of Title 18 Section 1503. Since the decision came down in 1952 and the 1953 legislature passed the same act with a few minor changes necessary to adapt it to Alaskan needs it would seem log-

ical that they intended to make the statute applicable to Alaska as an Alaskan statute. Therefore the federal courts' construction of Sec. 1503 should apply in this case and a few of them will be cited below.

Appellant's specification No. III (App. B. p. 3) is argued at page 18 in his brief. He claims that no proceeding was pending at the time the false statement was made before the commissioner at Barrow. As was pointed out in appellee's "Statement of the Case" at page 1 above, the defendant had been held to answer for the crime of rape and had been released on appearance bond at the time the statement was taken.

In the present case the defendant was accused of obtaining the statement for the purpose of having a criminal charge dismissed (Tr. Vol. 2 pages 114, 126 and 127). The statement was to be forwarded by the commissioner to the authorities at Nome and used as a basis for a dismissal of the action (Tr. Vol. 2 p. 88). It is not necessary that court action is actively being taken at the time of the corrupt behavior, but it is enough if court action is even being contemplated and the witness need not be under a formal subpoena. See *Odom v. United States,* C.C.A. Tex. 1941, 116 F. 2d 996, reversed on other grounds 61 S. Ct. 957, 313 U.S. 544, 85 L. Ed. 1511; *Walker v. United States,* C.C.A. No. 1938, 93 F. 2d 792. It has also been held that endorsement of a person's name on a complaint made him a witness. See *United States v. Bittinger,* D.C. No. 1876, Fed. Case No. 14,598. In the present case the witness was the victim of the rape.

Appellant relies on *United States v. McLeod,* 119 F. 416 (erroneously cited as United States v. "M'-Cloud") for the proposition that when the commissioner has held the defendant to answer he has completed his duties and can not thereafter be intimidated to obstruct justice (Appellant's Brief p. 19). Appellant overlooks the motive of the defendant in committing the assault on the commissioner in the *McLeod* case. There the purpose of the assault was revenge and this is quite different from the motive in the present case which was to obtain a false statement which was to be used to obtain a dismissal in the District Court. It is quite true that in both cases the commissioner himself was not engaged in the "administration of justice", but in the present case the defendant intended to use the commissioner in his scheme to thwart justice in the District Court. Obtaining a false statement *for that purpose* is the offense and it would not matter where the statement was obtained as the crime is against the District Court where defendant was held to answer and had entered his appearance bond.

Obstruction of justice may occur at any stage of a court proceeding from the time the complaint is signed (See *United States v. Bittinger, supra*) up until the time the case has been concluded. It has even been held that justice can be obstructed after the verdict is in but before the defendant is sentenced. See *United States v. Polakoff,* C.C.A. N.Y., 1941, 121 F. 2d 333, *cert. denied* 62 S. Ct. 107, 314 U.S. 626, 86 L. Ed. 503, where an attempt was made to influence

an assistant district attorney to be lenient by false representation.

The case on appeal is quite similar to the *Polakoff* case *supra* in that both were an attempt to influence the district attorney. In the present case the attempt was to influence him to have the case dismissed, in the other it was an attempt to cause him to be lenient.

It has been held that sending a letter to a grand juror with intent to influence the action of grand jury is a violation to Title 18 U.S.C.A. Sec. 243 (now Title 18 U.S.C. Section 1503) which punishes anyone who attempts to influence the action upon "any matter pending before such juror" regardless of the intent of the person exerting the influence. See *Duke v. United States,* C.C.A. Va. 1937, 90 F. 2d 840, 112 A.L.R. 317, *cert. denied* 58 S. Ct. 33, 302 U.S. 685. The charge in the present case (Sec. 1503) is quite similar except it refers to a matter prior to its actual consideration by a grand jury. In the present case the witness was one who would necessarily testify before the next grand jury as the defendant had been held to answer to the grand jury and she was the alleged victim of the rape. The only major difference in the two cases is that the charge of obstructing justice requires a corrupt intent. Proof of corrupt intent was offered in that the statement was claimed to have been false. Under old Title 18 Sec. 241 (now Title 18 U.S.C.A. Sec. 1503) it has been held that the witness need not actually be before the grand jury but that acts in preparation for attendance before the grand jury are included. See *Bosselman v. United*

States, N.Y. 1917, 239 F. 82 at 84, 152 C.C.A. 132, where it was held that altering account books preparatory to presenting them to the grand jury was a violation of the code.

In the *Odom* case *supra* the court said at p. 998:

> One may be a witness within the protection of this statute even though he may not be under formal subpoena. If he knows or is supposed to know material facts, and is expected to testify as to them, or be called to testify, he is a witness; and he is such, of course, when he has already given testimony, though not subpoenaed.

In the *Odom* case the witness was interfered with after the case, but the decision indicates that it is immaterial whether the interference is before, during or after the case and limits the fact in question as to whether or not the person is really a witness to the facts at issue in the case regardless of the stage of the proceedings or regardless of whether or not a subpoena has been issued. The case also holds that if the person approached is a witness that very little proof is required that defendant had knowledge that the person was in fact a witness where the accused does know that there is a court proceeding pending concerning the matter involved (pp. 998-999).

III. THE EXPRESSION BY THE DISTRICT ATTORNEY THAT HE THOUGHT THE DEFENDANT WAS "LYING" WAS MADE WHILE COMMENTING ON THE TESTIMONY OF THE DEFENDANT WHO TOOK THE STAND AND WAS NOT A REMARK WHICH WOULD PREJUDICE THE JURY.

Appellant contends that the District Attorney called the defendant a "liar". What was actually said is in doubt (Tr. Vol. 2 p. 47) as the reporter did not catch the exact language of the remark due to an interruption. It was conceded at the hearing on the motion for judgment of acquittal that the District Attorney said that he believed the defendant was lying (Tr. Vol. 1 p. 47). This remark was objected to at the time and the court instructed the jury to disregard it. The court later, out of the presence of the jury, said the remark was not actually prejudicial and that it was in error to have sustained the objection at all (p. 47). The court thus made an incorrect ruling favorable to the defendant.

The court also in Instruction No. 13 said to the jury:

> The arguments of counsel based upon study and thought may be, and usually are, helpful; however it should be remembered that arguments of counsel are not evidence and can not rightfully be considered as such. It is your duty to give careful attention to the remarks of counsel, so far as the same are based on evidence which you have heard and the proper deductions therefrom. . . . (Tr. Vol. 2 p. 18.)

The remark was made directly in reference to the appearance of the defendant on the stand (Tr. Vol.

2 p. 47) and not a mere statement of the prosecutor's own opinion derived from matters not actually presented in court.

Appellant in the District Court (Tr. Vol. 1 pp. 36 and 48) relied on the case of *United States v. Hallinan* (9 Cir.), 182 F. 2d page 880, for the theory that the government attorney should not give his opinion; actually that decision was quite the opposite. See page 885.

> Of course, counsel may, and often does, in argument to the jury, after the evidence has been presented, give the jury the benefit of his opinion of the veracity of the witness and the character and weight of testimony presented.

What the court condemned in the *Hallinan* case was very vile remarks made about the witnesses in the opening statement before the witnesses had testified. Remarks made at the close of the evidence concerning the testimony of witnesses who actually testified may be the subject of comment and even opinion.

Judge Hodge, further in his opinion in the lower court cites a case where much stronger comments were used and it was held not to be an error (Tr. Col. 1 pp. 49, 50). Namely *Johnston v. United States,* 9 Cir. 1907, 154 F. 445, in which the defendant was referred to as a "hired ruffian" and "hired gunfighter". The court held the remark was justified by the evidence.

As long as the District Attorney made the comment relative to defendant's testimony on the stand it is quite proper for him to comment on the defendant's testimony and the trial judge was apparently quite

well satisfied that that was what the District Attorney was doing (Tr. Vol. 1 pp. 48-50). Appellant's specification of error No. VII therefore does not stand.

IV. THE TESTIMONY OF WALTER SINN WAS ADMISSIBLE TO ESTABLISH THE CHARGE OF OBSTRUCTING JUSTICE AND WAS ADMITTED FOR THAT PURPOSE AND NOT TO CORROBORATE THE TESTIMONY OF THE VICTIM; THE TESTIMONY OF THE VICTIM WAS CORROBORATED BY THREE INDEPENDENT WITNESSES.

Appellant alleges in his brief at page 12 that the testimony of Walter Sinn, a police officer, should not have been admitted as it did not relate to the *res gestae* of the rape charge. A long argument follows this statement which includes several cases which hold that statements made by a victim after the completion of the crime at issue are not admissible as part of the *res gestae* but are hearsay and therefore not competent testimony. Appellee agrees with this general statement as to the law, but claims it does not apply here as the statement of the victim to the police officer was not admitted to corroborate her claim that she was raped, but was admitted to show that (1) she was a material witness in the rape case, (2) that she had made a statement that defendant later corruptly induced her to change. The testimony of Walter Sinn was admitted in support of the charge of obstructing justice, not in regard to the charge of rape (*i.e.* Cr. No. 1631 not 1632).

The court was quite clear in this respect. Reviewing the testimony of Walter Sinn as a whole it is revealed that he never actually testified as to what the

victim Virginia Ahkinga told him at all. He did testify that he made his complaint on the basis of what she told him, but did not say what she told him (Tr. Vol. 2 pp. 67-68). He also said that he did take a statement in writing which she later signed (p. 68) but this statement was not introduced by the government at all, but by the defendant's attorney previously during the cross-examination of Virginia Ahkinga, the person who made the statement (Tr. Vol. 2 pp. 39-40). Regardless of who introduced the exhibit in evidence the statement was not issued to prove the truth or falsity of the victim's accusation of rape, but, as far as the government is concerned to show that a statement used as a basis for a complaint had been made and a complaint issued thereon, and, as far as the defense is concerned it appears the exhibit was introduced so that there would be a contrary exhibit in the record to impeach the witness. At any rate, since the truth or falsity of the statement was not the main issue and since it was introduced at the time the person making the statement was being cross-examined by the defense it was not hearsay. All that Officer Sinn did was corroborate that the statement was actually made, he neither read it nor produced it for evidence as it was already in evidence.

That the statement was received because of its bearing on the charge of obstructing justice (No. 1631) see Tr. Vol. 2 pp. 12, 13 and 14, where both the government and the court stated that the statement was to be used in relation to the charge of obstructing justice and not as a subsequent consistent statement of a

rape victim or as pertaining to the *res gestae* of the rape case. In his opinion on the motion for a judgment of acquittal, Judge Hodge held that the statement was perfectly admissible because of its bearing on the charge of obstructing justice even though it would not have been admissible as to the rape charge (Tr. Vol. 1 pp. 50-51). The judge held that cases cited by defendant's counsel were not applicable as the evidence was to be used to prove the charge of obstructing justice and not the charge of rape.

As pointed out above in argument "I" the charge of obstructing justice itself would be admissible to show guilty conduct as evidence of rape. It could hardly be prejudicial to show the various elements of the charge of obstructing justice.

Appellant's objection to the testimony of Officer Sinn was that it was used to corroborate the victim and that without it the testimony of the victim would have stood uncorroborated. As was pointed out above, all Officer Sinn testified to was that a statement had been made which led to the complaint. The statement itself was already introduced by defendant's counsel. However, not by any stretch of the imagination was the testimony uncorroborated. It was corroborated by the witness, Mary Suvlu (Tr. Vol. 2 pp. 47-57) who testified that on the night in question the defendant had rented a hotel room under an assumed name. This room was the same room the victim had described. Further corroboration was given by the witness Albert Hagberg (Tr. Vol. 2 pp. 73-78) who testified that he occupied a room next to

the one occupied by defendant and heard a woman's voice and noises coming from the bed at the time in question. It was further corroborated by the witness Harold Stull (Tr. Vol. 2 pp. 79-83) who testified that he was in the lobby of the hotel and saw the victim and the defendant come out of the hotel room a few moments apart. All of these witnesses corroborated the girl's testimony that defendant had taken her to a hotel room and had intercourse with her there. Appellant's contention that without the statement made by the victim to the police officer her accusation of rape would not be corroborated simply does not stand in view of this other independent testimony. Therefore specifications Nos. IV, V, and X do not stand nor do the specifications relating to the judges' refusal of the motions attacking the verdict or for judgment of acquittal at the close of the evidence.

CONCLUSION.

I. The trial court did not err in consolidating the two causes for trial as they were two transactions inseparably connected together and either cause could have been presented at a trial for the other cause as competent evidence of guilt as each had a proper bearing on the factors of motive, intent and guilty knowledge necessary in both cases.

II. The allegations of the Indictment of Cause No. 1631 relating to a charge obstructing justice constituted a valid cause of action, as, although the commissioner who took the false sworn statement did not at that time have jurisdiction of the case, the state-

ment was taken for the purpose of obtaining a dismissal of a case in which the defendant had been held to answer to the grand jury.

III. The remark of the District Attorney to the effect that the defendant was lying was perfectly proper as it was given with reference to the appearance of the defendant on the stand and it was not the type of remark that is prohibited as being of a degrading or inflammatory nature. As it was not an opinion on the ultimate issue of the case, it was not prohibited as an opinion.

IV. The testimony of the police officer, Walter Sinn, was not admitted as part of the *res gestae* of the rape case or as a subsequent consistent statement for corroborative purpose, but was admitted to show that the witness was a witness to the rape case and that the acts of defendant in causing her to change the statement were acts constituting a corrupt obstruction of justice.

The errors complained of by appellant do not exist and the court's decision on the several motions and matters was based on sound interpretation of law. The judgment should be affirmed.

Dated, Nome, Alaska,
January 20, 1959.

Respectfully submitted,

RUSSELL R. HERMANN,
United States Attorney,
Second Division, District of Alaska,
Attorney for Appellee.